

1 Matlock Law Group, PC
2 Anne Leith Matlock, K Brian Matlock
3 1485 Treat Blvd., Suite 200
4 Walnut Creek, CA 94597
5 Office: (925) 944-7131
6 Fax: (925) 944-7138
E-mail: anne-leith@matlocklawgroup.com

7 Attorneys for Defendant/Counterplaintiff,
8 Dateway, Inc.

12 | AT&T Corp.

CASE NO. C07-02440 EDL

PLAINTIFF,

v

Dataway, Inc.

DEFENDANT.

**DATAWAY'S MOTION TO STRIKE
AT&T'S UNTIMELY REPLY TO
DATAWAY'S COUNTERCLAIMS**

18 | Dataway, Inc.

COUNTERCLAIMANT

v_a

AT&T Corp.

COUNTERDEFENDANT

Date: August 26, 2008
Time: 9:00 a.m.
Courtroom: E

25 Defendant and Counterplaintiff Dataway, Inc. (hereinafter "Dataway" or "Defendant")
26 hereby moves to strike the Reply of Counterdefendant AT&T Corp. to Counterclaim of
27 Counterclaimant Dataway Inc., d.b.a. as Dataway Designs (hereinafter "AT&T's
28 answer/reply" or "AT&T's responsive pleading", see Docket No.115) pursuant to Fed. R. Civ.

1 P. § 12(f) because each admission and denial in AT&T's answer/reply to Counterclaim of
 2 Counterclaimant Dataway is redundant, immaterial, impertinent, or scandalous because
 3 AT&T's pleading was filed over six (6) months after the deadline for such a responsive
 4 pleading had expired.

5 **ARGUMENTS**

6 **1. AT&T's Reply to Dataway's Counterclaims is extremely untimely and all**
 7 **allegations and denials therein should be stricken in conformity with the Federal Rules**
 8 **of Civil Procedure.**

9 On October 17, 2007 Defendant Dataway filed and served its Answer and Counterclaims
 10 to AT&T's Complaint for Damages supported by a Declaration of Anne-Leith Matlock and
 11 Exhibits A through E. See Docket Nos. 31 and 32. Docket No. 33 is the Certificate of Service
 12 of these two pleadings served on AT&T by Dataway.

13 Counterclaims state claims for affirmative relief just like complaints. Therefore, all
 14 procedures that are available with respect to answering and moving to dismiss claims in general
 15 are applicable when replying to counterclaims. As with a complaint, the plaintiff must serve an
 16 answer to a counterclaim in the defendant's answer or file a motion to dismiss the counterclaims
 17 within 20 days after service of the answer. Fed R Civ P 12(a)(1)(A) and (B). Three additional
 18 days must be added if service of the pleading is achieved by mail. Fed. R. Civ. P. 6(d) and
 19 5(b)(2)(C). The Certificate of Service states that Dataway's pleadings were served by
 20 electronic service in accordance with the pertinent rules and/or General Orders in this matter
 21 upon Timothy Carl Aires, AT&T's counsel of record. The twentieth day after service is
 22 November 6, 2007.

23 The only papers served and filed by AT&T were AT&T's Motion to Dismiss on
 24 November 5, 2007 and related supportive documents. Plaintiff's Motion to Dismiss was denied
 25 by the Court on January 16, 2008 and electronically filed and served on the same day.

26 Filing a motion to dismiss under Fed. R. Civ. P. 12(b) acts as a tolling mechanism to
 27 extend the time within which the defendant must file an answer. If the court denies the motion
 28 or postpones a decision on the motion until trial, the defendant must serve an answer within 10

1 days after receiving notice of the court's action. Fed. R. Civ. P. 12(a)(4). The tenth day after
 2 notice of the order (filed and served on January 16, 2008) was January 26, 2008. Pursuant to
 3 Fed. R. Civ. P. 6 the last day of the period computed shall not be included if it's a Saturday, a
 4 Sunday, or a legal holiday. Fed. R. Civ. P. 6(a). Hence, AT&T's answer/reply was due on
 5 Monday, January 28, 2008.

6 AT&T however, failed to file a timely responsive pleading by January 28, 2008. Instead,
 7 AT&T filed and served its responsive pleading on July 16, 2008, 170 days after the actual due
 8 date of this pleading. Upon information and belief, Dataway asserts that AT&T attempted to
 9 submit the AT&T answer/reply on July 16, 2008 (170 days late) in response to Dataway's
 10 Opposition to AT&T's Motion for Summary Judgment (hereinafter "Opposition to AT&T's
 11 MSJ"), filed and served on July 15, 2008. In the Opposition to AT&T's MSJ, Dataway
 12 demonstrated the consequences of AT&T's failure to respond. See Opposition to AT&T's MSJ,
 13 Docket No. 114, p. 3 l.6-20. AT&T's failure to respond to Dataway's pleading to which a
 14 responsive pleading was required resulted in an admission of the averment. Fed. R. Civ. P.
 15 8(b)(6). AT&T cannot avoid this result by filing and serving a responsive pleading 170 days
 16 late. In addition to being extremely untimely, AT&T is attempting to file its answer/reply after
 17 the end of the discovery period and after dispositive motions were filed. AT&T's answer/reply
 18 attempts to unacceptably circumvent procedural requirements.

19 Hence, pursuant to Fed R. Civ. P. 8(b)(6) the allegations of the answer and counterclaims
 20 and the lack of defenses are undisputed evidence on record because AT&T's failure to respond
 21 in a timely manner. Moreover, the factual allegations are not only stated and admitted as
 22 undisputed in Dataway's Answer and Counterclaim, but are also repeated and supported by the
 23 Depositions of Francisco Molieri and Simon Lewis, officers of Dataway. See the accompanying
 24 Declaration of Anne-Leith Matlock, p.2 l.16 – p. 3 l.25 and Exhibits A and B, attached to the
 25 Declaration.

26 As demonstrated above, AT&T admitted Dataway's allegations and waived its defenses.
 27 AT&T cannot be allowed to sidestep fundamental procedural rules by filing a responsive
 28 pleading at this grossly late stage. The resulting admissions and waived defenses by AT&T are

1 now and remain available to Dataway in order to establish Dataway's Counterclaims and
 2 demonstrate that AT&T's so-called undisputed "facts" are contrary to the record. For this
 3 reason, Dataway requested in its Opposition to AT&T's MSJ that AT&T's motion shall be
 4 denied and summary judgment in favor of Dataway is proper and shall be entered. AT&T
 5 should not be allowed to file its responsive pleading 170 days late and in violation of Fed R Civ
 6 P 12(a)(1). Being a bold attempt to sidestep the Fed. R. Civ. P., AT&T's answer/reply in its
 7 entirety should be stricken.

**2. AT&T's Affirmative Defenses Stated in the Untimely AT&T answer/reply must
 be Stricken because they were filed untimely and because they are Redundant**

10 The two affirmative defenses AT&T asserts in its untimely filed answer (see supra)
 11 must be stricken because they are redundant, immaterial, impertinent, and scandalous.

a. Dataway Stated Five Counterclaims upon which Relief shall be Granted

13 AT&T's first affirmative defense, that Dataway failed to state a claim under Fed.
 14 R. Civ. P. 12(b)(6) lacks merit. AT&T raised this defense previously in its Motion to
 15 Dismiss (Docket No. 46) which was denied by the Court. The Court ordered (Docket No.
 16 76) that AT&T failed to demonstrate why Dataway's state law claims would be
 17 preempted. In AT&T's untimely answer/reply, AT&T makes the same argument
 18 previously rejected by the Court and again fails to provide the arguments or explanation
 19 previously requested by the court.

20 Dataway, on the other hand, showed in its Opposition to AT&T's MSJ, Dataway
 21 that it sufficiently stated five counterclaims upon which relief shall be granted. Dataway
 22 satisfied the notice pleading requirements of the Federal Rules of Civil Procedure by
 23 making a short and plain statement of each claim, showing that the Counterplaintiff is
 24 entitled to relief, and making a demand for judgment for the relief the counterplaintiff
 25 seeks. Fed. R. Civ. P. 8(a). See Dataway's Opposition to AT&T's MSJ, p.7 1.27 – p.8 1.2.
 26 All facts supporting Dataway's claims are undisputed record evidence and discovery
 27 showed that Dataway's damages amount to \$ 57,200.00. See Dataway's Opposition to
 28 AT&T's MSJ, p.8 1.2-5. For this reason, AT&T's first defense is blatantly without merit:

1 **b. The Filed Rate Doctrine does not Apply and should be Stricken**

2 Without further explanation, AT&T asserts as its Second Affirmative Defense that the
 3 Filed Rate Doctrine purportedly bars Dataway's Counterclaims. As previously referred above,
 4 this Court's Order Denying AT&T's Motion to Dismiss stated that AT&T did not demonstrate
 5 why the federal tariff requirements and not the Ting holding should govern the dispute at hand.
 6 In Ting the court held that the telecommunications marketplace is detariffed and that state law
 7 causes of action are actionable. Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003). Throughout this
 8 case, Dataway asserted that Ting will prevent AT&T from relying on the filed tariff doctrine to
 9 bar Dataway's counterclaims. Id. The authority of Ting should be construed to apply to small
 10 business consumers. Similarly, Lovejoy and In re NOS Communications, which expressly
 11 authorized state law claims like those claimed by Dataway, should apply in the instant case.
 12 Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 102 (Cal. App. 3d Dist. 2001); In re NOS
 13 Communications, 495 F.3d 1052 (9th Cir. 2007).

14 Dataway disproved Plaintiff's argument that Dataway's counterclaims are preempted by
 15 the Federal Communications Act, 47 U.S.C. 201, *et. seq.* As the court expressly stated in Ting,
 16 "the principle of preemption, which was a product of the filed rate doctrine . . . did not survive
 17 detariffing." Ting, at 1139. Furthermore, "courts treat [47 U.S.C.] § 202(a) as a consumer
 18 protection provision that is designed to remedy unreasonable price disparities" and that "courts
 19 have never interpreted [47 U.S.C.] § 202(a) as a preemptive provision." Id., at 1140, n.8.
 20 Therefore, to the extent AT&T relies on 47 U.S.C. § 202 as preemptive, the reliance is
 21 misplaced.

22 The filed rate doctrine was designed to ensure "all purchasers of communications
 23 services receive[d] the same federally regulated rates." Id., at 1131 (quoting ICOM Holding,
 24 Inc. v. MCI Worldcom, Inc., 238 F.3d 219, 221 (2d Cir. 2001)). Under the filed rate doctrine, a
 25 regulated entity could not charge a rate other than that specified in its tariff. AT&T v. Cent.
 26 Office Tel., Inc., 524 U.S. 214, 222 (1998). Pursuant to this doctrine, federal law preempted any
 27 state-law claim seeking to enforce a contractual provision that differed from a filed rate. ICOM
 28 Holding, 238 F.3d at 221.

1 State law claims are specifically authorized in the new, deregulated area. *Id.*, at 1141.
 2 The detarrifing of telecommunications under the 1996 Communications Act “create[d] a
 3 complimentary role between federal and state law” *Id.*, at 1141. The market-based
 4 mechanism that replaced rate filing “depends in part on state law for the protection of
 5 consumers in the deregulated and competitive marketplace.” *Id.* The strongest statement of the
 6 role of state law claims under the new system came from the F.C.C. itself. The Commission
 7 expressly stated that “consumers will be able to pursue remedies under state consumer
 8 protection and contract laws in a manner currently precluded by the ‘filed-rate’ doctrine.”
 9 Second Report and Order, 11 F.C.C.R. 20,730 at ¶ 38. According to the F.C.C., under the new
 10 system, consumers will be protected both through the F.C.C. complaint process and state law.
 11 *Id.*, at ¶ 42. In Ting, the Ninth Circuit specifically addressed the effect of the 1996
 12 Communications Act on the filed rate doctrine and preemption and found that “under the
 13 competition-based regime adopted by Congress in 1996, and implemented by the FCC, *state*
 14 *law protections are no longer excluded*” Ting, at 1143 (emphasis added). The mechanism
 15 chosen by Congress to ensure reasonable rates “permits—indeed, depends upon—the imposition of
 16 state law.” *Id.*, at 1144. Given this express language from the court, Plaintiff cannot
 17 successfully contend Dataway’s counterclaims are barred.

18 Other controlling authority also demonstrates Dataway’s state law claims are not barred
 19 by the filed rate doctrine. In Lovejoy, where AT&T also unsuccessfully argued that “there is no
 20 fraud exception to the filed rate doctrine...”, the court stated that AT&T’s assertion is irrelevant
 21 unless a carrier intentionally misrepresents its rate and a customer relies on the
 22 misrepresentation. Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 102 (Cal. App. 3d Dist. 2001).
 23 In such a case the carrier cannot be held to the promised rate if it conflicts with the published
 24 tariff. *Id.* The maxim that there is no “fraud” exception to the filed rate merely means that courts
 25 will not intrude into the F.C.C.’s jurisdiction by enforcing promises to charge rates or provide
 26 services which vary from the filed tariff, regardless of the promisor’s intent.” *Id.*, at 102.
 27 However, “...it does *not* mean that all fraudulent conduct committed by a carrier is immune
 28 from remedy.” *Id.*, at 102. In Brown, the court held that a claim is not precluded by the filed-

1 rate doctrine if (1) the Plaintiff alleges that there is no authorization in the tariff to charge a
 2 certain fee, and (2) that the fee therefore violated the tariff. Brown v. MCI Worldcom Network
 3 Servs., Inc., 277 F.3d 1166, 1172 (9th Cir. 2002). A plaintiff needs to be compensated for the
 4 tortious conduct pleaded. Lovejoy, at 101. Claims for “fraud, fraudulent inducement to switch
 5 contracts[and] intentional interference with contract . . . are not preempted by the filed-rate
 6 doctrines.” In re NOS Communications, 495 F.3d at 1060 (9th Cir. 2007) (emphasis added).

7 Dataway does not challenge the terms of a tariff. Dataway does not seek rate
 8 preferences not accorded to AT&T's other customers, and Dataway does not seek to enforce
 9 “side agreements” which vary from published tariffs. Rather, Dataway wants to enforce the
 10 contracted rate pursuant to the tariff. Moreover, rates have meaning only when one knows the
 11 services to which they are attached. Am. Tel. & Tel. Co. v. Centraloffice Tel., 524 U.S. 214,
 12 223 (U.S. 1998). Any claim for excessive rates can be couched as a claim for inadequate
 13 services and vice versa. Id. The Communications Act recognizes this in the §§ 203(a) and (c).
 14 Hence, Dataway can maintain its counterclaims even assuming, arguendo, that the filed rate
 15 doctrine still has preclusive effect. AT&T's actions support Dataway's claim for exemplary
 16 damages. Three factors determine whether an award of exemplary damages is reasonable.
 17 BMW of N. Am. v. Gore, 517 U.S. 559, 574-575 (1996). The California Supreme Court
 18 adopted and followed the Gore test for exemplary damages in Johnson v. Ford Motor Co., 113
 19 P.3d 82 (2005). “The most important indictor of the reasonableness of a punitive damages
 20 award is the degree of reprehensibility of the defendant's conduct.” Id. at 575. Intentional acts
 21 of misconduct by a defendant that cause economic injury “can warrant a substantial penalty.”
 22 Id., at 576. Additionally, “evidence that a defendant has repeatedly engaged in prohibited
 23 conduct while knowing or suspecting that it was unlawful would provide relevant support for an
 24 argument that strong medicine is required to cure the defendant's disrespect for the law.” Id., at
 25 576-577.

26 AT&T's actions support a claim for exemplary damages because AT&T has engaged in
 27 intentional acts of misconduct that caused economic injury to Dataway. AT&T created a
 28 Legacy T account that was billed to Dataway despite not having received any authorization

1 from Dataway to open such an account. As a result of the creation of this account, Dataway
 2 suffered economic injury including, but not limited to, lost time and expense attempting to
 3 resolve the charges for unauthorized calls made by hackers. AT&T was aware that its system is
 4 prone to exploitation, as demonstrated by the news article (See Exhibit C attached to the
 5 accompanying Declaration of Anne-Leith Matlock) discussing the vulnerability of AT&T
 6 systems. Nevertheless, AT&T failed to apply required verification procedures and took no other
 7 action to prevent its customers systems from being exploited. This failure to secure its system
 8 and prevent client exploitation demonstrates a disregard of the law for which exemplary
 9 damages is the appropriate remedy. AT&T's pattern of disregarding its legal obligations despite
 10 the fact that such disregard inflicted economic injury on its customers warrants exemplary
 11 damages to cure AT&T's blatant disregard of its obligations and ensure customers are protected
 12 against such behavior in the future. In fact, AT&T also admitted that state law protections are
 13 no longer excluded and that the Ting holding governs the case at hand when it failed to respond
 14 to Dataway's Answer and Counterclaims. Essentially, AT&T waived the inapplicable "Filed
 15 Rate Doctrine" Defense.

16 **3. AT&T did not Request Extension of Time and Could not Show Good Cause for**
 17 **Such Extension of Time**

18 The untimely filed AT&T answer/reply must be stricken because AT&T (i) failed to file
 19 a Motion to Change Time and (ii) cannot show good cause for extension of time to file an
 20 extremely late answer/reply. There is no good cause why AT&T should be allowed to receive
 21 special treatment. A party can only file a motion to change time if the party is without fault in
 22 creating the crisis or if the crisis occurred as a result of excusable neglect. Mission Power
 23 Eng'g Co. v. Continental Cas. Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995). Only under such
 24 conditions may a party receive special treatment. Id., at 492. AT&T failed to request an
 25 extension of time to file its responsive pleading months after the statutory time to respond
 26 expired. Further, AT&T cannot and has not demonstrated good cause in submitting its reply
 27 170 days late. Finally, upon information and belief, Dataway asserts that AT&T had ample
 28 opportunity to answer/reply under the statutory period and, in fact, engaged in an extensive

1 motion practice in this case. However, as discussed, AT&T failed to file its answer/reply
 2 contrary to fundamental procedural rules and should not be allowed to circumvent the
 3 applicable rules.

4 AT&T's reply is inexcusably late for 170 days and this court should strike AT&T's
 5 reply in its entirety.

6 **4. AT&T's Request for Costs is Unreasonable and Scandalous**

7 In its prayer, AT&T requested that Counterclaimant takes nothing, demanded costs of
 8 suit, including reasonable attorneys' fees and other relief as the Court deems just and proper.
 9 This demand, made in an extremely belated answer that is blatantly redundant, must be stricken
 10 just like all other allegations, denials and defenses related to AT&T's untimely answer/reply..
 11

12 **CONCLUSION**

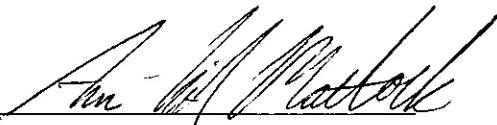
13 In light of the above mentioned incurable defects of AT&T's responsive pleading,
 14 Defendant Dataway respectfully requests that AT&T's answer/reply should not be available
 15 and be deemed ineffectual. All facts and allegations in Dataway's Answer and Counterclaim
 16 shall remain admitted pursuant to Fed. R. Civ. P. 8(b)(6).

17 Should AT&T not withdraw its answer/reply by August, 6 or such other time as the
 18 court may prescribe, on the grounds that (i) the filing of the untimely AT&T reply/answer
 19 cannot be sustained by a proper legal basis or is warranted by existing law and (ii) has only
 20 served to cause unnecessary delay in this case, the Court should strike AT&T's reply/answer in
 21 its entirety as Dataway argued herein.

22
 23 Dated: July 21, 2008

MATLOCK LAW GROUP

24
 25 By:


 26 Anne-Leith Matlock, Esq.

27 Attorneys for Defendant/
 28 Counterclaimant Dataway, Inc.